No. 92 - 1625

In The

Supreme Court of the United States

October Term, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,

Petitioners,

-against-

JOHN I. BAGWELL; CLINCHFIELD COAL CO.; and
SEA "B" MINING CO.,

Respondents.

On Writ of Certiorari to
The Supreme Court of Virginia

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of the AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent, the resolution of disputes between employer and employees by collective bargaining, with a minimum of government interference, in the free pursuit of the negotiating process by both sides.

Where, as here, judicial interference becomes unwanted by either side in a labor dispute, and is not necessary to redress criminal behavior, such interference may actually inhibit negotiation between the parties and, as a result, be an impediment to ultimate resolution of the dispute. AEF is concerned that a determination adverse to the position of the petitioners in this matter will effectively sanction inappropriate government interference in the collective bargaining process.

STATEMENT OF THE CASE

Petitioners represent employees in the coal industry, including the businesses conducted by Clinchfield Coal Company and Sea "B" Mining Company (collectively, the "Companies") in the southeastern region of Virginia. On or about April 4, 1989, following the expiration of a collective bargaining agreement, petitioners commenced a strike in protest against alleged unfair labor practices by the Companies. On April 12, 1989, the Companies filed a verified bill of complaint against petitioners, seeking injunctive relief. This action was based upon an allegation that members of petitioners had been engaged in activities in violation of Virginia's "right to work" law. On April 13, 1989, following a civil evidentiary hearing, the Circuit Court of Russell County, Virginia, established picketing guidelines and enjoined petitioners and their members from engaging in certain activities deemed injurious to the Companies' operations.

In May 1989, on application by the Companies, alleging that petitioners' members had committed a variety of violations of the injunction, the circuit court conducted a hearing at which petitioners were directed to show cause why they should not be held in contempt. After the hearing, the Court found seventy-two separate violations of its injunction and imposed $642,000 in contempt fines ($424,000 of which were suspended, conditioned upon payment of the balance within a certain period of time),

payable to the Commonwealth of Virginia.[1] In addition, the court held that, in the event of any future violations of the court's injunction, fines would be levied at a rate of $100,000 for each "violent" violation and $20,000 for each "nonviolent" violation.

In June 1989, a second motion was made by the Companies to have petitioners held in contempt for alleged new violations of the injunction. Following a hearing, the circuit court held petitioners in contempt, and fines were imposed in the total amount of $2,465,000, payable to the Commonwealth of Virginia. In addition, the court denominated the fines as "civil and coercive" in nature. In the same order, the court established a new fine schedule "for the purpose of coercing the defendants to comply with the court's injunctions."

During the period from July through December, 1989, each time on motion made by the Companies, the circuit court issued its third, fourth, fifth, sixth, seventh and eighth contempt orders. Following a hearing on the third contempt motion, the court asserted, *inter alia*, as follows:

> [The court] find[s] that . . . [petitioners] and [their] members have engaged in acts of violence that are directly related to their picketing in this

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[1] Although the circuit court originally denominated the contempt orders in which these fines were levied as "civil" in nature, the court later determined that all such orders had been punitive and, therefore, "criminal" in nature. As a result, the court vacated the orders on the ground that appellants had not been provided with appropriate constitutional safeguards.

> labor dispute and that they have been characterized by mass picketing and blocking of rights of way, both public and private . . . and . . . have intimidated or attempted to intimidate by threats and by violence members of this community who are attempting to exercise their right to go to work and make a living under Virginia law.
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> * * *
>
> This court's injunction is designed to keep the peace here in Virginia and to be sure that . . . the citizens of this state, in these communities, can live in peace, free from the acts of terror which have been committed upon this community.[2]

Nevertheless, the court informed petitioners that they were not entitled to the full constitutional protection afforded to an alleged contemnor in a criminal contempt proceeding, inasmuch as "these were civil proceedings."[3]

In total, the circuit court levied in excess of $64,000,000 in fines against petitioners, substantially all of which were directed to be paid either to the Commonwealth of Virginia or to the

[2] *Bagwell v. International Union*, 244 Va. 463, 469, 423 S.E.2d 349, 353 (1992) (quoting from a holding by the lower court).

[3] *International Union v. Clinchfield Coal Co.*, 12 Va. App. 123, ___, 402 S.E.2d 899, 901 (1991) (quoting from a holding by the lower court), *rev'd*, *Bagwell v. International Union*, 244 Va. 463, 423 S.E.2d 349 (1992).

Counties of Russell and Dickenson in Virginia. In all instances, petitioners timely objected to the fines on the ground that they were criminal, not civil, in nature and had been levied without petitioners' having been afforded a hearing conducted under proper constitutional safeguards.

On January 1, 1990, during the pendency of petitioners' consolidated appeals of the first five contempt orders to the Virginia Court of Appeals, the Companies and petitioners (with the assistance of a "super mediator" appointed by the United States Secretary of Labor) reached a full settlement of their labor dispute, specifically agreeing, *inter alia*, that the parties would dismiss all pending litigation and have vacated all outstanding civil judgments, including contempt fines. On January 24, 1990, a joint motion to vacate all uncollected contempt fines was, in fact, made. However, although the circuit court agreed to vacate those contempt fines payable to the Companies, the court refused to vacate the approximately $52,000,000 in unpaid fines payable to the Commonwealth of Virginia and the Counties of Russell and Dickenson.[4]

The Companies played no part in, and took no position regarding, petitioners' appeal of the first five contempt orders, which was argued in October 1990. Although respondent was not permitted to intervene as a party on that appeal, he was granted leave to submit an *amicus curiae* brief. In *International Union v.*

[4] As a result of the circuit court's dismissal of the underlying civil litigation, there was no longer a procedural mechanism in place for collection of these fines. Accordingly, the court appointed respondent, John L. Bagwell, as "special commissioner" charged with defending and collecting those fines.

Clinchfield Coal Co., supra, the Court of Appeals of Virginia rejected petitioners' contention that the contempt orders had been "criminal," not "civil," in nature. Nevertheless, the court reversed the lower court's decision and vacated the contempt fines, agreeing with petitioners' argument that settlement of the underlying litigation also settled every proceeding that was part of that litigation. *See id.* at __, 402 S.E.2d at 905 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911) ("[w]hen the main case is settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled, of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings")).

Thereafter, respondent's motion for leave to appeal the Court of Appeals' decision with respect to the first five contempt orders to the Supreme Court of Virginia was granted. The Supreme Court also certified and consolidated with that appeal petitioners' appeal from the sixth, seventh and eighth contempt orders. In *Bagwell v. International Union, supra*, the Court reversed the decision of the Court of Appeals, holding that (i) respondent should have been granted leave to intervene as a party, and (ii) the contempt fines should not have been vacated because they had not been rendered moot by the settlement of the underlying litigation. As a result, the Court upheld the fines, which it found to be "civil," rather than "criminal," in nature.

SUMMARY OF ARGUMENT

Although the $52 million in fines that had been levied against petitioners were payable to the Commonwealth of Virginia and the Counties of Russell and Dickenson, the lower court denominated those as "civil" and "coercive" in nature

because they were assessed only after petitioners had been found (following civil evidentiary hearings) to have violated the terms of injunction orders that contained schedules of prospective fines that would be set in the event of any future violations. Concededly, there was a "coercive" aspect to the orders establishing these schedules. However, the later orders, which actually made the contempt findings and imposed the fines, were not coercive; they were punitive in that they were designed to punish petitioners for violations of the injunctions that were found to have been committed by petitioners' members. As a further demonstration of the essentially punitive nature of these fines, the Supreme Court of Virginia held that, notwithstanding the joint motion by both sides in the labor dispute to vacate all civil contempt fines, the $52 million of unpaid fines were properly continued against petitioners to maintain "the dignity of the law and public respect for the judiciary." *Bagwell, supra* at 478, 423 S.E.2d at 358.

Although multiple issues have been raised by petitioners on this appeal, *amicus* addresses only whether the Supreme Court of Virginia improperly upheld what, in reality, were criminal contempt fines in violation of petitioners' constitutional protections. It is respectfully submitted that a sovereign may not take an application by a private litigant for civil relief and convert it into a *de facto* criminal proceeding by the state, without affording the alleged contemnors the constitutionally required due process that attaches to such a proceeding.

ARGUMENT

> Contempt of court is the Proteus
> of the legal world, assuming an almost
> infinite diversity of forms.[5]

This Court has never suggested that the distinction between civil contempt and criminal contempt is easily performed in all cases. However, the Court has repeatedly acknowledged that the distinction is a vitally important one because it determines what procedure governs adjudication of the contempt. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988); *Bloom v. Illinois*, 391 U.S. 194, 201-02 (1968). Selection of the appropriate procedure is necessary because of the additional safeguards that are constitutionally mandated in the context of a criminal contempt hearing:

> The burden of proof is on the prosecution, the party charged cannot be required to testify against himself, cannot be put in double jeopardy, and cannot be tried without appropriate notice of the charge. Inferentially at least, he is entitled to counsel and compulsory process for bringing in his witnesses. He is now entitled to a jury trial if the criminal sentence is a potentially serious one. As with other crimes, intent is an element of criminal contempt, and it must be proven before criminal punishment can be inflicted . . . . The classification of a contempt hearing as a criminal one may also

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[5] Moskovitz, *Contempt of Injunctions, Criminal and Civil*, 43 COLUM. L. REV. 780, 780 (1943).

> affect the right of appeal or the route that an appeal takes. At least in some criminal contempt cases, the state should be a party to any appeal proceedings. The criminal classification will also invoke the pardoning power of the state . . . .

Dobbs, *Contempt of Court; A Survey*, 56 CORN. L. REV. 183, 242-43 (1971).

In *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), this Court provided the following oft-quoted justification for distinguishing between civil and criminal contempt:

> The distinction between refusing to do an act commanded, remedied by imprisonment until the party performs the required act; and doing an act forbidden, punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] character of the punishment.

Id. at 443. This justification was reaffirmed in the context of fines, rather than imprisonment, in *Hicks, supra*, where this Court articulated the following standard:

> If the relief provided is a fine, it is remedial when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on some one who has not been afforded the protections

> that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

488 U.S. at 632.

Nevertheless, this Court also recognized that "the `civil' and `criminal' labels of the law have become increasingly blurred." *Id.* at 631. "In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order." *Id.* at 635. However, where vindication of its own authority becomes the primary goal of the court, the sanctions are, by definition, more punitive in nature and, therefore, more in the nature of criminal contempt.

The definitive statement of what sanctions are available for civil contempt comes from this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947). "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sanctioned." *Id.* at 303-04.

At bar, the trial court, the Court of Appeals of Virginia, and the Supreme Court of Virginia each went out its way to characterize the fines at issue as "coercive," thereby providing justification for the civil nature of the hearings that resulted in findings that petitioners had violated certain injunctions. *Amicus*

does not question that the trial court's original establishment of a prospective fine schedule was designed to be coercive in nature. However, the orders made *after* civil contempt hearings were conducted, in which petitioners were found to have violated the injunctions and in which fines were levied, were not coercive; they were punitive and related only to past behavior. It is on this point that the reasoning of the lower courts breaks down. For example, the Supreme Court of Virginia held:

> When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control over his own destiny. The same is true of the court's orders in the present case.

Bagwell, supra at 477, 423 S.E.2d at 357. But, petitioners were *not* ordered to perform an affirmative act. The injunction order that petitioners were found to have violated was prohibitory, not mandatory, in nature.

Certainly, a mandatory injunction requiring the performance of some affirmative act may contain a prospective fine in the event of nonperformance. That prospective fine is civil in nature because it is designed to coerce performance of the affirmative act, thereby recalling the admonition by this Court that "[o]ne who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid a penalty. And those who are imprisoned until they obey the order, 'carry the keys to their prison in their own pockets.'" *Penfield Co. v. S.E.C.*, 330 U.S.

585, 590 (1947) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).[6]

All prohibitory injunctions contain the implied threat of contempt in the event that an act is committed in violation of the order. (Indeed, without such an implied threat, the injunction would be of little value.) Sanctions imposed as a result of a finding of such contempt may be "compensatory" or they may be "punitive," but they cannot logically be characterized as coercive. The fact that the prohibitory injunctions at issue in this case made the threat of contempt *express*, by setting forth a prospective schedule of fines that would be levied in the event of a violation, does not change the underlying nature of the contempt. As such, the sanctions imposed (which were concededly not compensatory) should not have been converted from their essentially criminal nature.

Of course, courts may seek both to punish a contemnor for past violations of a court order and to coerce the contemnor into avoiding any future violations. (This may be especially true in the context of labor disputes, where the large numbers of individuals involved and the public nature of the defiance of an order may transfer the conduct in question from the realm of a private civil contempt into a perceived public disrespect for the authority of the court.) Nevertheless, it is fundamental that civil contempt relates to the rights of plaintiffs, and criminal contempt

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[6] *Cf. Gompers, supra* at 442 ("if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done or afford any compensation for the pecuniary injury caused by the disobedience").

relates to the judge's notion that defendant's behavior in failing to comply with a court order was so offensive and flagrant as to border on the criminal.[7] Thus, where (as here) "a fine is ordered paid to the state, the judgment is punitive and the proceeding is considered one for criminal contempt." *Moskovitz, supra* at 790 (citing *In re Merchants' Stock & Grain Co.*, 223 U.S. 639 (1912); *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935)).

Amicus does not suggest here that the conduct of which petitioners' members were accused of having committed was justified or excusable. Whether petitioners or their members violated the trial court's injunction is not at issue. However, if the trial court truly believed that contempt fines were necessary and appropriate to maintain "the dignity of the law and public respect for the judiciary," *Bagwell, supra* at 478, 423 S.E.2d at 358, the correct vehicle should have been a criminal contempt hearing, at which petitioners would have been afforded the myriad of constitutional safeguards that are unique to such proceedings.

Furthermore, by characterizing the proceedings as "civil" in nature, designed to "coerce" certain conduct on the part of petitioners, the lower courts plainly intended to keep this dispute in the civil arena. It was, therefore, disingenuous for the Supreme Court of Virginia to vacate the Court of Appeals' order granting the joint motion of the litigants to vacate the contempt

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[7] Certainly, this notion was behind the apparent acceptance by the Supreme Court of Virginia of the trial court's characterization of the conduct of petitioners' members as "acts of terror which have been committed upon this community." *Bagwell, supra* at 469, 423 S.E.2d at 353.

fines. Either these fines should have been characterized as "criminal" in nature, in which case they should be vacated because they were levied under procedural safeguards that fell below those constitutionally mandated, or, if they truly were "civil" in nature, they should be vacated because they were settled by the underlying settlement of the litigation. The lower courts cannot have it both ways. By characterizing the punitive and public sanctions that were levied against petitioners as "coercive"--thereby avoiding the prerequisites of criminal contempt proceedings--but then refusing to allow petitioners and the Companies to resolve those sanctions privately (in the context of their civil settlement), the lower courts acted inconsistently with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees.[8]

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[8] For example, the findings and policies set forth in the National Labor Relations Act provide, in pertinent part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1973); *see also NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

Even given the apparent consideration by the Supreme Court of Virginia of petitioners' purportedly "vast financial resources," *id.* at 480, 423 S.E.2d at 359, the extremely large size of the fines imposed--an aggregate of $52 million--obviously had to have an impact on petitioners' posture in the settlement negotiations. Indeed, there is much in the facts that suggests that a desire to avoid the massive civil fines obtained by the employer may have contributed to the ultimate settlement of the labor dispute. Had petitioners not believed that their settlement agreement with the Companies would be realized in every respect, including the vacatur of all outstanding contempt fines, petitioners may, understandably, have reconsidered the settlement, thereby prolonging the strike.[9]

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[9] Moreover, even if enforcement of the fines reinstated by the Supreme Court of Virginia will not undo the settlement agreement reached between petitioners and the Companies, it will surely exacerbate the tensions between the two sides during the collective bargaining process that begins once that agreement expires. Therefore, the holding by the Supreme Court of Virginia that settlement of a labor dispute may not resolve all outstanding civil contempt sanctions will, necessarily, have a chilling effect on future settlement negotiations between labor and management.

Therefore, what the Supreme Court of Virginia has done is constitutionally offensive and represents a distinctly "big brother" approach to the collective bargaining process. After all, it was the Companies that had originally moved in the trial court to have petitioners held in contempt; therefore, the Companies should be permitted to control the destiny of the resulting contempt proceedings (even after sanctions were imposed). It is no more than an indulgence in judicial activism for the trial court to have essentially become a third party in a civil litigation that private parties wished to abandon and to have converted that litigation into an action by the sovereign against private citizens. Under the guise of pursuing a civil contempt, the Supreme Court of Virginia permitted the imposition of massive punishment by the sovereign, which should have been restricted to the realm of a criminal contempt proceeding, with the corresponding due process safeguards that are constitutionally mandated.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and all outstanding contempt fines against petitioners should be vacated.

Respectfully submitted,

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